रजिस्टर्ड नं० एल०-33/एस० एम०/13-14/94.

राजपत्र, हिमाचल प्रदेश

(असाधारण)

हिमाचल प्रदेश राज्यशासन द्वारा प्रकाशित

शिमला, शनिवार, 29 अक्तूबर, 1994/7 कार्तिक, 1916

हिमाचल प्रदेश सरकार

निर्वाचन विभाग

अधिसूचना

शिमला-171002, 24 अक्तूबर, 1994

संख्या 3-14/94-ई०एल०एन०.—भारत निर्वाचन आयोग की अधिसूचना संख्या 82/हि० प्र० वि० स०/4/94, दिनांक 4 अक्तूबर, 1994 तदानुसार 12 आश्विन, 1916 (शक्) अंग्रेजी रूपान्तर सहित, जिसमें हिमाचल प्रदेश उच्च न्यायालय, शिमला, का निर्वाचन अर्जी संख्या 4, वर्ष 1994 का निर्णय निहित है, को जनसाधारण की सूचना हेतु प्रकाशित किया जाता है ।

आदेश से,

राजेन्द्र भट्टाचार्य,
वित्तायुक्त एवं सचिव (निर्वाचन) तथा
मुख्य निर्वाचन अधिकारी,
हिमाचल प्रदेश ।

2871-राजपत्र/94—29-10-94—1,326. (3909) मूल्य: 1 रुपया ।

भारत निर्वाचन आयोग

नई दिल्ली,

4 अक्तूबर, 1994

दिनांक ——————————

12 आश्विन, 1916 (शक)।

अधिसूचना

सं० 82/हि० प्र०-वि० स० 0/4/94.—लोक प्रतिनिधित्व अधिनियम, 1951 (1951 का 43) की धारा 106 के अनुसरण में, निर्वाचन आयोग 1994 की अर्जी संख्या 4 में शिमला स्थित हिमाचल प्रदेश उच्च न्यायालय के तारीख 13 सितम्बर, 1994 के निर्णय को एतद्द्वारा प्रकाशित करता है।

आदेश से,

घनश्याम खोहर,
सचिव,
भारत निर्वाचन आयोग।

ELECTION COMMISSION OF INDIA

New Dehli,
4th October, 1994

Dated the——————————
12 *Asvina,* 1916 (*Saka*).

NOTIFICATION

No. 82/HP-LA/4/94.—In pursuance of Section 106 of the Representation of the People Act, 1951 (43 of 1951), the Election Commission hereby publishes Judgment dated 13th September, 1994 of the High Court of Himachal Pradesh at Shimla in Election Petition No. 4 of 1994.

(Here print the judgment attached)

By order,

GHANSHYAM KHOHAR
Secretary,
Election Commission of India.

IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

Election Petition No. 4 of 1994*

Date of Decision: 13*th September*, 1994.

SHRI VIKERAM ANAND .. *Petitioner.*

Versus

SHRI RAKESH SINGHA .. *Respondent.*

For the Petitioner(s) : M/s K.D. Sood, A.K. Goel and M.C. Mandhotra, Advocates.

*Whether reporters of Local Papers may be allowed to see the Judgement ?

For the Respondent(s) : M/s Vikash Bhattacharya, Jagdish ats and Y.S. Dhaulta, Advocates.

*2. Election Petition No. 1 of 1994

SHRI HARBHAJAN SINGH BHAJJI *Versus* SHRI RAKESH SINGHA & ORS.

For the petitioner : M/s K. D. Sood and M. C. Mandhotra, Advocates.

For the respondents : Sh. Jagdish Vats, Advocate, for respondent No. 1.

Shri R. K. Sharma, Advocate, for respondent No. 2.
Nemo for other respondents.

3. Election Petition No. 5 of 1994

SHRI SURESH BHARDWAJ *Versus* SHRI RAKESH SINGHA & ORS.

For the petitioner : Sh. R. K. Sharma, Advocate.

For the Respondents : M/s Vikash Bhattacharya, Jagdish Vats and Y. S. Dhaulta, Advocates, for respondent No. 1.

Sh. M. C. Mandhotra, Advocate, for respondent No. 2.
Nemo for other respondents.

KAMLESH SHARMA, J :

These three Election Petitions (Election Petition No. 4 of 1994, Vikram Anand *Vs.* Rakesh Singha ; 5 of 1994 Suresh Bhardwaj *Vs.* Rakesh Singha and others ; and 1 of 1994 Harbhajan Singh Bhajji *Vs.* Rakesh Singha and others) are being disposed of by a common judgment as the relif sought for in them is common. It is to declare the election of Sh. Rakesh Singha, from 8th Shimla Assembly Constituency held in November, 1993, void. Election Petition No. 4 of 1994, which has been filed by an Elector, Sh. Vikram Anand, is on the grounds that the result of the election of Sh. Rakesh Singha has been materially affected by the improper acceptance, of his nomination papers as he was disqualified to be chosen to fill the seat of 8th Assembly Constituency having been convicted and sentenced to imprisonment for not less than two years as provided under Sec. 8(3) of the Representation of the People Act, 1951 (hereinafter called 'the Act').

In Election Petition No. 5 of 1994, which has been filed by a defeated candidate, Sh. Suresh Bhardwaj, who had contested the election on the ticket of Bhartiya Janta Party, besides the grounds taken in Election Petition No. 4 of 1994, two additional grounds have been taken that the result of election of Sh. Rakesh Singha has been materially affected by improper reception,

refusal and rejection of votes or reception of votes which is void and non-compliance of the provisions of 'Conduct of Elections Rules', in particular Rules 53 and 59A thereof, for the counting of votes.

In the third Election Petition No. 1 of 1994, which has been filed by another defeated candidate, Sh. Harbhajan Singh Bhajji who had contested the election on the Congress (I) Party ticket, the grounds of challenge are only that the result of election of Sh. Rakesh Singha has been materially affected by improper reception, refusal and rejection of votes and non-compliance of the provisions of 'Conduct of Elections Rules, in particular, Rules', 53 and 59A thereof for the counting of Votes. The Returned candidate, Sh. Rakesh Singha had contested the election on the ticket of C.P.I. (M).

The facts in brief are that the elections to the Himachal Pradesh State Legislative Assembly were notified to be held in the month of October/November, 1993. According to the Election Programme, Nomination papers in respect of 8th Shimla Constituency were delivered by the candidates or their proposers to the Returning Officer (Deputy Commissioner) or to the Assistant Returning Officer (Additional Deputy Commissioner), Shimla, in his office at District Court Building, Shimla, between 11.00 A. M. and 3.00 P. M. on a day (other than a Holiday) not later than 16-10-1993. The Nomination Papers were taken up for scrutiny in the Office of the Deputy Commissioner in District Court building, Shimla on 18-10-1993 at 11.00 A. M. The notice of withdrawal of a candidate was to be delivered by him or his proposer or his agent, who had been authorised in writing by the candidate to deliver it to the Returning Officer (Deputy Commissioner) or to the Assistant Returning Officer (Addl. Deputy Commissioner), Shimla, in his office at District Court Building, Shimla before 3.00 P. M. on 20-10-1993. After the scrutiny and the last date of withdrawal, seven candidates contested the election which was held on 9-11-1993 between 7.00 A.M. to 5.00 P.M. The counting of votes started in the prescribed premises on 28-11-1993 in the afternoon and the result was declared on 29-11-1993. All the contesting candidates secured valid votes as indicated aaginst their names hereinunder :—

Sl. No.	Name of the Candidate	Party position	Valid votes secured
1	2	3	4
1.	Sh. Rakesh Singha	CPI (M)	11,854
2.	Sh. Harbhajan Singh Bhajji	Congress (I)	11,695
3.	Sh. Suresh Bhardwaj	B. J. P.	11,363
4.	Sh. Chaman Lal	B. S. P.	88
5.	Sh. Joginder Singh	Independent	34
6.	Sh. Durga Singh Rathore	-do-	39
7.	Sh. Faujdar Singh Chauhan	-do-	32

The total votes polled were 35,304 out of which valid votes were 35,105 and rejected votes were 199. Sh. Rakesh Singha was declared returned candidate having secured 159 more valid votes in his favour as compared to his next rival Sh. Harbhajan Singh Bhajji.

First of all, this Court will deal with the ground of challenge which is common in two Election Petitions (Election Petitions No. 4 and 5 of 1994) in respect of which the following issue was framed in both these Election petitions:—

(1) Whether the election of first respondent Sh. Rakesh Singha is liable to be set aside for the reason that his nomination papers were improperly accepted by the Returning Officer ? OPP

In Election Petition No. 4 of 1994, this is the only issue framed besides the issue of Relief, whereas in Election Petition No. 5 of 1994 besides this issue, there are four other issues framed but this issue has been tried as preliminary issue.

In respect of the allegations that Sh. Rakesh Singha was convicted and sentenced to imprisonment for not less than two years, as provided under sub-section (3) of section 8 of the Act, there is no dispute. The dispute is about the effect of filing of appeal challenging conviction in the Supreme Court and grant of bail by the Supreme Court as a consequence of which the sentence passed against him is suspended during the period of bail, on the disqualification which he has incurred due to order of conviction and sentence.

The undisputed facts are that Shri Rakesh Singha alongwith other accused, was tried and convicted for offences punishable under Section 148 I.P.C. and also under Sections 452, 427 and 325 read with Sec. 149 I.P.C. However, instead of sentencing them to any punishment, the Sessions Judge directed them to be released on their entering into a bond in the sum of Rs. 10,000/- with one surety in the like amount in each case undertaking to appear and receive sentence when called upon during a period of 2 years from the date of judgment and in the meantime to keep peace and be of good behaviour. In the appeal filed by the State (Criminal Appeal No. 42 of 1979), this Court by its judgment dated 25-9-1987 (Ex. P. W.-1/A) upheld the conviction of Sh. Rakesh Singha for having committed an offence punishable under Sec. 148 I. P. C. as also under Sections 452, 427 and 325 read with Sec. 149 I.P.C. This Court further held Sh. Rakesh Singha and another accused guilty and convicted them for having committed an offence under Sec. 304, Part II read with Sec. 149 I P.C. This Court also revised the quantum of punishment and sentenced Rakesh Singha and another accused to undergo rigorous imprisonment for a period of 5 years each under Sec. 304 Part II read with Sec. 149 IPC and rigorous imprisonment for a period of 3 years for each of the offences under Sections 325 and 452 read with Sec. 149 IPC as well as to two years rigorous imprisonment under Sec. 148 IPC. They were not awarded separate sentences under Sec. 427 read with Sec. 149 IPC. However, it was ordered that all the above sentences will run concurrently. Sh. Rakesh Singha and other accused persons were directed to surrender to their bail bonds forthwith to undergo the remaining part of their sentence and the Sessions Judge, Shimla, was asked to ensure implementation of the order passed by this Court.

The Judgment dated 25-9-1987 passed by this Court was challenged by Sh. Rakesh Singha in S.L.P. (Crl.) No. 2897/87 in the Supreme Court of India which was granted *vide* order dated 23-3-1988 (Ex. P.W.-1/B in Election Petition No. 4/94) but his bail application was rejected for the time being. However, it was ordered that the application may be renewed after six months. Thereafter on 27-10-1987, Sh. Rakesh Singha surrendered in the Court of the Addl. Sessions Judge (II), Shimla, who sent him to Model Central Jail, Nahan, as per his order of the day (Ex. PW-1/C) on his Bail application (Crl. Misc. petition No. 4707/88 in Crl. Appeal No. 185/88) the Supreme Court of India passed orders on 10-1-1989 (Ex. PW-1/D) in the following terms:—

> "The appellant shall be released on bail to the satisfaction of Sessions Judge, Shimla but it will be on a condition that whenever he leaves his native place he will inform the Police, that he will not leave India without the permission of the Court and that he will report at the nearest Police Station, wherever he is, once every month."

Sh. Rakesh Singha sought clarification of the order dated 10-1-1989 by filing another application (Crl. Misc. Petition No. 299 of 1990 in Crl. Appeal No. 185 of 1988) and the Supreme Court was pleased to pass the following order (Ex. P. W-1/F) on 2-2-1990: --

> "Pending Criminal Appeal No. 185 of 1988, this Court by an order dated 10-1-1989 in Criminal Misc. Petition No. 4707 of 1988 directed that the appellant shall be released on bail subject to certain conditions. Counsel for the appellant has now filed a misc.

application by which he requests that this Court should clarify that as a result of the order granting bail, the sentence on the appellant will remain suspended during the pendency of the appeal. It is clear from the language of Sec. 389 of the Code of Criminal Procedure that when bail is granted to an accused, the sentence on him remains suspended during the period of bail. In fact, Sec. 389 (1) of the Code of Criminal Procedure specifically requires the Court to suspend the sentence and release the accused on bail. Sub-section (3) of Sec. 389 of the Code also makes it clear that when an accused is released on bail his sentence remains suspended during the period of bail. We, therefore, agree with the learned counsel for the appellant that, by the order granting bail, the sentence of the appellant will remain suspended during the pendency of the appeal.

It appears that the appellant seeks this clarification because he intends to stand in the assembly elections in the forthcoming elections. We, therefore, make it clear that we express no opinion on the question whether any disqualification, which the appellant may be suffering from, as a result of the conviction would stand removed by the clarification given by us. That will be a matter for the Election Officer to consider in the light of the appropriate law. We also make it clear that all the conditions, subject to which bail was granted, will continue to be in force till the disposal of the appeal.

With these observations, the application is ordered. A copy of this order may be given dasti to the counsel for both the parties."

It is not in dispute that Criminal Appeal No. 185 of 1988 filed by Sh. Rakesh Singha is still pending adjudication in the Supreme Court of India. The dispute is, what is the effect of the orders dated 10-1-1989 and 2-2-1990 passed by the Supreme Court of India granting bail to Shri Rakesh Singha whereby the sentence awarded to him will remain suspended during the pendency of the appeal.

The case set up by the petitioners in the Election Petitions is that the disqualification incurred by Sh. Rakesh Singha continues despite the order of suspension of sentence imposed upon him because it has no effect on his conviction whereas the case of Sh. Rakesh Singha is that the order of suspension of sentence imposed upon him impliedly puts his conviction in abeyance as a result of which the operation of his disqualification is also arrested.

Before this Court deals with the contentions of the parties in respect of their respective cases, it wil refer to relevant provisions of law.

The relevant part of Article 191 of the Constitution of India which lays down the disqualifications for membership of the Legislative Assembly or Legislative Council of a State is as under:

"(1) A person shall be disqualified for being chosen as, and for being, a member of the Legislative Assembly or Legislative Council of a State—

(*a*)	XXX	XX	XXX
(*b*)	XXX	XX	XXX
(*c*)	XXX	XX	XXX
(*d*)	XXX	XX	XXX

(*e*) if he is so disqualified by or under any law made by Parliament...."

The Representation of the People Act, 1951 is such law made by the Parliament. The relevant provisions therein are as follows: –

"8. Disqualification on conviction for certain offences—(1) A person convicted of

an offence punishable under

(*a*) section 153A (offence of promoting enmity between different groups on ground of religion, race, place of birth, residence, language etc. and doing acts prejudicial to maintenance of harmony) of section 171 E (offence of bribery) of section 171 F (offence of undue influence or personation at an election) of sub-section (1) or sub-section (2) of Sec. 376 of Sec. 376 A or section 376B or section 376 C or section 376 D (offences relating to rape) or Section 498 A (offence of cruelty towards a woman by husband or relative of a husband) or sub-section (2) or sub-section (3) of section 505 (offence of making statement creating or promoting enmity, hatred or ill-will between classes or offence relating to such statement in any place of worship or in any assembly engaged in the performance of religious worship or religious ceremonies) of the Indian Penal Code (45 of 1860), or

(*b*) The Protection of Civil Rights Act 1955 (22 of 1955), which provides for punishment for the preaching and practice of 'untouchability', and for the enforcement of any disability arising therefrom ; or

(*c*) Sec. 11 (offence of importing or exporting prohibited goods) of the Customs Act, 1962 (52 of 1962); or

(*d*) section 10 to 12 (offence of being a member of an association declared unlawful offence relating to dealing with funds of an unlawful association or offence relating to contravention of an order made in respect of notified place of the unlawful Activities (Prevention) Act, 1967 (37 of 1967); or

(*e*) the Foreign Exchange (Regulation) Act, 1973 (46 of 1973) ; or

(*f*) the Narcotic Drugs and Psychotropic Substances Act, 1985 (61 of 1985) ; or

(*g*) section 3 (offence of committing terrorist acts) or Sec. 4 (offence of committing disruptive activities) of the Terrorist and Disruptive Activities (Prevention) Act, 1987 (28 of 1987) ; or

(*h*) section 7 (offence of contravention of the provisions of sections 3 to 6) of the Religious Institutions (Prevention of Misuse) Act, 1988 (41 of 1988) ; or

(*i*) section 125 (offence of promoting enmity between classes in connection with the election) or sec. 135 (offence of removal of ballot papers from polling stations) or section 135A (offence of booth capturing) or clause (*a*) of sub-section (2) of section 136 (offence of fraudulent defacing or fraudulently destroying any nomination paper) of this Act, shall be disqualified for a period of six years from the date of such conviction.

(2) A person convicted for the contravention of—

(*a*) any law providing for the prevention of hoarding or profiteering ; or

(*b*) any law relating to the adulteration of food or drugs ; or

(*c*) any provision of the Dowry Prohibition Act, 1961 (28 of 1961); or

(*d*) any provisions of the Commissions of Sati (Prevention) Act, 1987 (3 of 1988),

and sentenced to imprisonment for not less than six months, shall be disqualified from the date of such conviction and shall continue to be disqualified for a further period of six years since his release.

(3) A person convicted of any offence and sentenced to imprisonment for not less than two years other than any offence referred to in sub-section (1) or sub-section (2) shall be disqualified from the date of such conviction and shall continue to be disqualified for a further period of six years since his release.

(4) Notwithstanding anything in sub-section (1), sub-section (2) and sub-section (3) a disqualification under either sub-section shall not, in the case of a person who on the date of the conviction is a member of Parliament or the Legislature of a State, take effect until three months have elapsed from that date or, if within that period an appeal or application for revision is brought in respect of the conviction or the sentence, until that appeal or application is disposed of by the Court...."

"32. *Nomination of candidates for election.*—Any person may be nominated as a candidate for election to fill a seat if he is qualified to be chosen to fill that seat under the provisions of the Constitution and this Act or under the provisions of the Government of Union Territories Act, 1963 (20 of 1963), as the case may be."

"36. *Scrutiny of nominations.*—(1) On the date fixed for the scrutiny of nominations under section 30, the candidates, their election agents, one proposer of each candidate, and one other person duly authorised in writing by each candidate, but no other person, may attend at such time and place as the returning officer may appoint; and the returning officer shall give them all reasonable facilities for examining the nomination papers of all candidates which have been delivered within the time and in the manner laid down in Sec. 33.

(2) The returning officer shall then examine the nomination papers and shall decide all objections which may be made to any nomination and may, either on such objection or on his own motion, after such summary inquiry, if any, as he thinks necessary, reject any nomination on any of the following grounds:—

(*a*) that on the date fixed for the scrutiny of nominations the candidate either is not qualified or is disqualified for being chosen to fill the seat under any of the following provisions that may be applicable, namely:—

Articles 84, 102, 173 and 191.

Part II of this Act and sections 4 and 14 of the Government of Union Territories Act, 1963 (20 of 1963); or

(*b*) that there has been a failure to comply with any of the provisions of section 33 or section 34, or

(*c*) that the signature of the candidate or the proposer on the nomination paper is not genuine.

(3) Nothing contained in clause (*b*) or clause (*c*) of sub-section (2) shall be deemed to authoirse the rejection of the nomination of any candidate on the ground of any irrigularity in respect of a nomination paper, if the candidate has been duly nominated by means of another nomination paper in respect of which no irregularity has been commtted.

(4) The returning officer shall not reject any nomination paper on the ground of any defect which is not of a substantial character.

(5) The returning officer shall hold the scrutiny on the date appointed in this behalf under clause (*b*) of Section 30 and shall not allow any adjournment of the proceedings except when such proceedings are interrupted or obstructed by riot or open violence or by causes, beyond his control ;

Provided that in case an objection is raised by the returning officer or is made by any other person, the candidate concerned may be allowed time to rebut it not later than the next day

but one following the date fixed for scrutiny, and the returning officer shall record his decision on the date to which the proceedings have been adjourned.

(6) The returning officer shall endorse on each nomination paper his decision accepting or rejecting the same and, if the nomination paper is rejected, shall record in writing a brief statement of his reasons for such rejection.

(7) For the purposes of this section, a certified copy of an entry in the electoral roll for the time being in force of a constituency shall be conclusive evidence of the fact that the person referred to in that entry is an elector for that constituency, unless it is proved that he is subject to a disqualification mentioned in section 16 of the Representation of the People Act, 1950 (43 of 1950).

(8) Immediately after all the nomination papers have been scrutinsed and decisions accepting or rejecting the same have been recorded, the returning officer shall prepare a list of validly nominated candidates, that is to say, candidates whose nominations have been found valid, and affix it to his notice board."

"100. *Grounds for declaring elections to be void.* (1) Subject to the provisions of sub-section (2) if the High Court is of the opinion,

(*a*) that on the date of his election a returned candidate was not qualified, or was disqualified, to be chosen to fill the seat under the Constitution or this Act or the Government of Union Territories Act, 1963 (20 of 1963) ; or

(*b*) that any corrupt practice has been committed by a returned candidate or his election agent or by any other person with the consent of a returned candidate or his election agent ; or

(*c*) that any nomination has been improperly rejected ; or

(*d*) that the result of the election, in so far as it concerns a returned candidate, has been materially affected—

(*i*) by the improper acceptance or any nomination; or

(*ii*) by any corrupt practice committed in the interests of the returned candidate by any agent other than his election agent; or

(*iii*) by the improper rejection, refusal or rejection of any vote or the reception of any vote which is void ; or

(*iv*) by any non-compliance with the provisions of the Constitution or of this Act or of any rules or orders made under this Act,

the High Court shall declared the election of the returned candidate to be void.

(2) If in the opinion of the High Court, a returned candidate has been guilty by an agent, other than his election agent, of any corrupt practice but the High Court is satisfied -

(*a*) that no such corrupt practice was committed at the election by the candidate or his election agent, and every such corrupt practice was committed contrary to the orders, and without the consent of the candidate or his election agent;

(*c*) that the candidate and his election agent took all reasonable means for preventing the commission of corrupt practices at the election; and

(*d*) that in all other respects the election was free from any corrupt practice then the High Court may decide that the election of the returned candidate is not void."

For deciding the controversy in hand, Section 389 of the Code of Criminal Procedure is also relevant. It is :

"389. *Suspension of sentence pending the appeal* ; release of appellant on bail—(1) Pending any appeal by a convicted person, the appellate Court may, for reasons to be recorded by it in writing, order that the execution of the sentence or order appealed against be suspended and also, if he is in confinement, that he be released on bail, or on his own bond.

(2) The power conferred by this section on an Appellate Court may be exercised also by the High Court in the case of an appeal by a convicted person to a court subordinate thereto.

(3) Where the convicted person satisfies the Court by which he is convicted that he intends to present an appeal, the Court shall,—

(*i*) where such person, being on bail, is sentenced to imprisonment for a term not exceeding three years ; or

(*ii*) where the offence of which such person has been convicted is bailable one, and he is on bail.

Order that the convicted person be released on bail, unless there are special reasons for refusing bail, for such period as will afford sufficient time to present an appeal and obtain the orders of the Appellate Court under sub-section (1) ; and the sentence of imprisonment shall, so long as he is so released on bail, be deemed to be suspended.

(4) When the appellant is ultimately sentenced to imprisonment for a term or to imprisonment for life, the time during which he is so released shall be excluded in computing the term for which he is so sentenced."

The learned counsel for the petitioners have urged that a plain reading of Sec. 8(3) of the Act makes it clear that as soon as conviction and sentence of imprisonment for not less than 2 years is recorded, the period of disqualification starts and it continues for a period of six years since the release of the convicted person. Sub-section (3) of Sec. 8 does not speak of what will happen if an appeal is filed by the convicted person and the sentence imposed upon him is suspended, as it has been done in the case of Shri Rakesh Singha, whereas under sub-section (4) of Sec. 8 of the Act, for a member of Parliament or legislature of a State, a specific provision has been made that disqualification shall not take effect until three months have elapsed from the date of order of conviction or until the appeal or application is disposed of by the Court challenging the order of conviction or sentence, if filed by such a person. Admittedly, Shri Rakesh Singha was neithe a member of Parliament nor the legislature of the State on the date of his conviction, as such, he does not come in this exception. Therefore, according to the learned counsel for the petitioners, the order of suspension of sentence passed by the Supreme Court of India in the appeal filed by Sh. Rakesh Singha is of no effect to arrest the disqualification incurred by him. They urge that his nomination paper was required to be rejected on this ground alone and by its improper acceptance, his result has been materially affected and his election deserves to be declared as void.

On the other hand, the contention of the learned counsel for Shri Rakesh Singha is that by the order of suspension of sentence passed under Sec. 389 Cr. P. C. by the Supreme Court of India in the appeal filed by Sh. Rakesh Singha, the operation of disqualification as provided under sub-section (3) of Sec. 8 of the Act stood arrested. Their submission is that the words ".....convicted of any offence and sentenced to imprisonment for not less than two years" used in sub-section (3) of Sec. 8 of the Act are conjunctive and not disjunctive, therefore, if by an order sentence is

suspended, the conviction also stands suspended. Another point raised is that the word "convicted" as used in sub-section (3) of Sec. 8 of the Act refers to the final conviction by the last Court where the appeal is filed and not to conviction by the trial Court or the first appellate Court which may be set aside by the last Court. It is also pointed out that the petitioners are debarred from challenging the election of Sh. Rakesh Singha on this ground as they had failed to raise this objection before the Returning Officer at the time of scrutiny as provided under Sec. 36 of the Act. This objection deserves to be rejected outrightly as it has not been raised in the written statements to the Election Petitions filed by Sh. Rakesh Singha. However, a perusal of Sec. 36 of the Act shows that so far one of the petitioners, Sh. Vikram Anand (Election Petition No. 4 of 1994) is concerned, he is not supposed to be present at the time of scrutiny. Being an elector, he has a right to file election petition calling in question the election of Sh. Rakesh Singha on the grounds specified in sub-section (1) of Sec. 100 of the Act as provided under Sec. 81 of the Act. Admittedly, the other petitioner Sh. Suresh Bhardwaj (Election Petition No. 5 of 1994) who was supposed to be present at the time of scrutiny of nominations had not raised this objection. The Nomination Paper in Form 2-B of Sh. Rakesh Singha is also not produced on record from which it could be ascertained whether he had supplied the information of his disqualification and its alleged suspension by the Supreme Court in appeal for decision of Returning Officer. Be that as it may, in the facts and circumstances of this case, this Court holds that the petitioners are entitled to challenge the election of Sh. Rakesh Singha on the ground that his result was materially affected by improper acceptance of his nomination papers.

It is correct that the words, ". . . convicted of any offence and sentenced to imprisonment for not less than two years. . . .", used in sub-section (3) of Sec. 8 of the Act are used conjunctively and not disjunctively but with a different purpose. Sub-section (3) of Sec. 8 of the Act has two parts. The first part provides what constitutes disqualification and the second part provides the period during which the disqualification will exist. A judgment in a criminal case, as provided in Sec. 354 Cr.P. C. contains point or points for determination, the decision thereon and the reasons for the decision. It specifies the offence or offences of which and the section of Indian Penal Code or other law under which the accused is convicted and the punishment to which he is sentenced. In other words, the judgment of conviction contains a declaration of which offence or offences the accused is found guilty, followed by the order of either punishment or release on probation of good conduct or after admonition. Quantum of punishment will depend upon the gravity of offence or offences and other relevant factors proved on record. Keeping these in view, the purpose of using the words ". . . convicted of any offence and sentenced to imprisonment for not less than two years. . . ." conjunctively, becomes very clear that to constitute disqualification under sub-section (3) of Sec. 8 of the Act, the order of conviction should be followed by an order of sentence of imprisonment for not less than two years. If a person is convicted but not sentenced to imprisonment or sentenced to imprisonment for less than two years, he does not incur disqualification under sub-section(3) of Sec. 8 of the Act. So long as the order of conviction followed by the order of sentence of imprisonment for not less than two years exists, the disqualification continues. If in appeal or revision petition, conviction is set aside or sentence of imprisonment is varied to less than two years, the disqualification is wiped out retrospectively with effect from the date of scrutiny, as a result of which the challenge to the election of a returned candidate that his nomination paper was wrongly accepted must fail, as he cannot be said to be disqualified on the date of nomination. (please see: *Vidya Charan Shukla* vs. *Purshotam Lal Kaushik* AIR 1981 SC 547).

Mere filing of an appeal to challenge the order of conviction and sentence of not less than two years is of no affect till it is finally decided setting aside the conviction or reducing the sentence to less than two years. During the pendency of appeal, by suspension of sentence, order of conviction is not automatically put in abeyance. Order of suspension of sentence is passed under Sec. 389 Cr. P. C., which provides that the Appellate Court may, for reasons to be recorded by it in writing, order that execution of sentence or order appealed against be suspended and, also if he is in confinement, that he be released on bail or on his bond. It may be pointed out that

the Appellate Court may have appeal before it from order requiring security or refusal to accept or reject surety for keeping peace or good behaviour as provided under Sec. 373 Cr. P. C. or from conviction as provided under Sec. 374 Cr. P. C. or appeal by State Government against sentence as provided under Sec. 377 Cr. P. C. etc. etc. During the pendency of appeal the Appellat Court has the powers to suspend the execution of sentence or order appealed against The effect of the order of suspension of sentence is that the convicted person is released on bail if he is in confinement or in the Appellate Court passes order of releasing the convicted person on bail, the effect is that his sentence is suspended till he is on bail during the pendency of appeal, as explained by the Supreme Court by its order dated 2-2-1990. Such orders of the Appellate Court releasing the convicted person on bail or suspending the sentence pertain to execution of the sentence and these have nothing to do with the order of conviction. By suspension of sentence and/or release on bail during the pendency of appeal, the order of conviction is not automatically or impliedly suspended as canvassed on behalf of Sh. Rakesh Singha. Despite suspension of sentence and release on bail, the order of conviction remains in operation holding the person guilty of such offence or offences for which he has been awarded sentence of imprisonment for not less than two years, as such the disqualification as provided under sub-section (3) of Sec. 8 of the Act continues. In order to attract disqualification under sub-section (3) of Sec. 8 of the Act, the execution of the order of conviction and sentence of imprisonment or any part thereof is not required. What is necessary is the actual conviction and sentence imposed by the Court for not less than two years, which order remains in operation despite stop put to execution of the order of sentence during the pendency of appeal by releasing the convicted person on bail and suspending the sentence awarded to him.

In this context, another question arises whether a convicted person who has challenged the judgment can ask for suspension/stay of order of conviction besides suspension of execution of sentence and releasing him on bail, in order to save himself from the rigours of judgment and order of conviction so that the operation of the disqualification incurred by him under sub-section (3) of Sec. 8 of the Act is arrested. Sec. 389 of the Code of Crl. Procedure does provide for suspension of an order appealed against in addition to suspension of sentence and granting of bail during the pendency of appeal. The order appealed against may be as specifically provided under Sec. 373 or Sec. 378 or Sec. 380 Cr. P. C. or under any other provision of law. The expressions 'Order' and 'judgment' have neither been defined nor used in a definite sense as is apparent from the perusal of various provisions of the Code of Crl. Procedure, as such, these to words have to be understood in the context these occur in the Code of Crl. Procedure.

Under Sec. 374 Cr. P. C. which provides for appeal against conviction, neither the word 'judgment' nor the word 'order' has been used. As noticed hereinabove, in reference to Sec. 354 Cr. P. C. the judgment of conviction consists of, *inter alia* the order of conviction which is declaration of the guilt of the accused, followed by the order of sentence, if the Court decides to punish the convicted person. In a given case, when a a convicted person challenges the judgment against him, besides asking for suspension of execution of senetnce and grant of, bail, he may also ask for suspension of order of conviction to save himself from its rigours during the pendency of the appeal. There may be quite a few such cases, as of public servant who are discharged from service or applications have to be filed for passport or election matters, such as the one in hand, etc. etc. But there cannot be any doubt that order of suspension of conviction cannot be passed in a routine manner. The appellate Court may pass such an order in an exceptional case in which it is satisfied that even by accepting the entire findings given by the trial Court in its judgment, *prima facie*, no case is made out against the appellant. In this view of the matter, this Court holds that the word 'order' used in Sec. 389 Cr. P. C. has a wider meaning and it includes the order of conviction which may be suspended by the appellate Court in a fit case. (Please see : *V. Sivaramire.ld* v. *State*, 1990 Crl. L.J. 167).

However, so far the case in hand is concerned, apparently Sh. Rakesh Singha never applied for suspension of the order of conviction, as such, there was no occasion for the Supreme Court to consider his case and pass such an order. By its order dated 10-1-1989, the Supreme Court has only released him on bail subject to the conditions stated therein which amounted to suspension of sentence awarded to him as explained by the Supreme Court in its order dated 2-2-1990. On the question, whether the disqualification suffered by Sh. Rakesh Singha under sub-section (3) of Sec. 8 of the Act stood removed by the order granting bail to him, the Supreme Court had not expressed any opinion. However, after examining the legal position, this Court has come to the conclusion that when the appellate Court passes an order of suspension of sentence and or release on bail of a convicted person, the order of his conviction still remains in existence and the disqualification, suffered by him as a result of conviction and sentence for a period of not less than two years as envisaged under sub-section (3) of Sec. 8 of the Act, is not automatically suspended and it continues to be in operation.

The Second part of sub-section (3) of Sec. 8 of the Act, provides for the period of disqualification starting from the date of conviction till the expiry of six years since the release of the convicted person. From this provision, it is clear that once a person is eclipsed with the disqualification, he will be free of it after six years of his release and it is not necessary that he should undergo the full term of sentence of imprisonment awarded to him. He may be granted remission of punishment under Sec. 432 of the Code of Crl. Procedure or on account of Jail Rules or on account of general amnesty to enable him to earn his release earlier than the period of sentence of more than two years imposed by the Court. It will not affect the actual sentence passed by the Court and the disqualification suffered by him as provided in first part of sub-section (3) of Sec. 8 of the Act. However, it might reduce the period of disqualification as provided in the second part of the said section. For taking this view, this Court finds support from the following observations of the Supreme Court in *Sarat Chandra Rabha and others* vs. *Khagendranath Nath and others*, AIR 1961 SC 334 :

> "....In the first place, an order of remission does not wipe out the offence ; it also does not wipe out the conviction. All that it does is to give an effect to the execution of the sentence ; through ordinarily a convicted person would have to serve out the full sentence imposed by a Court, he need not do so with respect to that part of the sentence which has been ordered to be remitted. An order of remisson thus does not in any way interfere with the order of the sentence passed by the Court and frees the convicted person from his liability to undergo the full term of imprisonment inflicted by the Court, though the order of conviction and sentence passed by the court still stands as it was...."
> "(Emphasis supplied).

From these observations, this Court further gets light that execution of the sentence which is suspended by the order of suspension of sentence and release on bail does not affect the order of conviction and sentence of imprisonment for a period not less than two years passed by the Court which constitutes the disqualification under sub-section (3) of Sec. 8 of the Act.

From the interpretation of this provision as given hereinabove, it is clear that both parts of sub-section (3) of Sec. 8 of the Act are independent of each other, the first part provides what constitutes qualification and the second part the period during which the disqualification remains in operation.

The other argument addressed on behalf of Sh. Rakesh Singha that the word 'convicted' used in the first part of sub-section (3) of Sec. 8 of the Act refers to the final conviction by the last Court, is also without any merit. If this submission is accepted, the disqualification under sub-section (3) of Section 8 of the Act will never be attracted where the trial Court conviction is challenged in an appeal and moreover there was no necessity to legislate sub-section (4) of Sec. 8 of the Act for sitting members of the Parliament or legislature of the State. By enacting sub-section (4)

of Sec. 8 of the Act, an exception has been carved out for the benefit of sitting members of the Parliament and Legislature of the State which further proves the intention of the Legislature that for those who are not sitting members of the Parliament and Legislature of the State, the disqualification starts with the order of conviction passed by any Court, whether final or not. The words "date of such conviction" used in sub-section (3) of Sec. 8 of the Act, mean, the date on which conviction is made by the trial Court, which is the starting point of disqualification prescribed by this provision. The interpretation given by the learned counsel appearing for Sh. Rakesh Singha cannot be accepted as it will render sub-section (4) of Sec. 8 of the Act redundant. It is also significant to note that inspite of several amendments in the Act, provisions analogous to sub-sections (3) and (4) of Sec. 8 of the Act in substantially the same terms are continuing in the Act laying down disqualifications on conviction and making an exception only in case of sitting members. Had the word 'convicted' been used as the final conviction, as is being urged by the learned counsel appearing for Sh. Rakesh Singha, the Legislature would not have retained sub-section (4) of Sec. 8 of the Act. It is, therefore, not correct to say that sub-section (3) of Sec. 8 of the Act is attracted only as a result of such conviction by the last Court and not earlier. Further, the expression 'date of conviction' used in sub-section (4) of Sec. 8 of the Act clearly refers to the date of conviction by the trial Court also because had it been used to mean conviction by final Court only, there would have been no occasion to file appeal or revision against it. If for sitting members of Parliament and Legislatures of State, the starting point of disqualification incurred by virtue of sub-section (3) of Sec. 8 of the Act is 'date of such conviction' by the trial Court even, different meaning cannot be construed for persons other than sitting members and that too when legislature has chosen not to extend such a benefit to them as has been provided for sitting members under sub-section (4) of Sec. 8 of the Act. In this view of the matter, same meaning is required to be given to expression 'date of such conviction' used in all sub-sections of Sec. 8 of the Act as they are used in the same context. It is, therefore, not correct to say that disqualification provided in sub-section (3) of Sec. 8 of the Act is attracted only when a person is convicted by the final Court and not the trial court or Court of first appeal.

Another point raised by the learned counsel appearing on behalf of Shri Rakesh Singha is that appeal is a continuation of the trial and during the pendency of the appeal, the presumption of innocence of the accused person continues as has been held in *Emperor* v. *Nur Ahmed*, AIR 1944 Allahabad 342 and *Ananta Nanda and others* v. *Trilochan Das* AIR 1969 Orissa 75, as such, it is conviction by the final Court of resort which is intended to attract the disqualification in sub-section (3) of Sec. 8 of the Act. There cannot be any dispute with the propositions laid down in the judgments referred to above but these are to be read in the context these are made. These cannot be of any assistance for the interpretation of sub-section (3) of Sec. 8 of the Act which has been given hereinabove.

For arriving at the above conclusions, this Court has found support in the reasoning given in *Purshottamlal Kaushik* v. *Vidya Charan Shukla* AIR 1980 Madhya Pradesh 164, in which almost a similar controversy was involved. The only distinction was that by the time the High Court decided the Election petition, the appeal filed by the returned candidate against his conviction and sentence stood accepted setting aside his conviction and sentence on all counts. The learned Judge of Madhya Pradesh High Court held that the crucial date for deciding whether the nomination of a candidate was improperly accepted so as to make out the grounds under Sec. 100(1)(d) of the Act is the date fixed for the scrutiny of the nomination and acquittal in appeal on a subsequent date is of no consequence. Holding this, the learned Judge had proceeded to interpret the then existing provisions of sub-sections (2) and (3) of Sec. 8 of the Act which are almost similar to the present sub-sections (3) and (4) of Sec. 8 of the Act providing for the disqualifications. In the appeal against the judgment of the Madhya Pradesh High Court, the Supreme Court of India, in

Vidya Charan Shukla v. *Purshottam Lal Kaushik*, (supra) reversed the judgment of the High Court and held :

> "In short the acquittal of the appellant before the decision of the election petition pending in the High Court, had with retrospective effect made his disqualification non-existent even at the date of the scrutiny of nominations. This being the position, the High Court could not at the time of deciding the election petition form an opinion as to the 'existence' of a non-existent ground and sustain the challenge to the appellant's election under Sec. 100(1) (*d*) (*i*)."

"It is true that in order to adjudicate upon the validity of the challenge to the appellant's election under cl. (*d*)(*i*) of Sec 100 (1), what was required to be determined by the High Court was whether the nomination of the appellant was *properly or improperly* accepted by the Returning Officer. But, in order to determine this question, it was necessary for the High Court to decide, as a preliminary step, whether the appellant was disqualified at the date of scrutiny of the nomination papers, for if he was disqualified, his nomination could not be said to have been properly accepted by the Returning Officer and if, on the other hand, he was not disqualified, his nomination would have to be regarded as properly accepted by the Returning Officer. The primary question before the High Court, therefore, was whether or not the appellant was disqualified at the date of scrutiny of the nomination papers and it is difficult to see how the determination of this question could be made on any principle other than that governing the determination of a similar question under clause (*a*) of Sec. 100(1). It has been laid down in Manjit Lal's case (AIR 1971 SC 330) the returned candidate cannot be said to be disqualified at the date of the election, if before or during the pendency of the election petition in the High Court his conviction is set aside and he is acquitted by the appellate Court it must be held on the application of the same principle, that, in like circumstances, the returned candidate cannot be said to be disqualified at the date of the scrutiny of the nomination papers. On this view, the appellant could not be said to be disqualified at the date of scrutiny of the nomination paper since his conviction was set aside in appeal by this Court and if that be so, the conclusion must inevitably follow that the nomination of the appellant was properly accepted by the Returning Officer. The position is analogous to that arising where a case is decided by a Tribunal on the basis of the law then prevailing and subsequently the law is amended with retrospective effect and it is then held by the High Court in the exercise of its writ jurisdiction that the order of the Tribunal discloses an error of law apparent on the face of the record, even though having regard to the law as it then existed, the Tribunal was quite correct in decision the case in the manner it did, *vide* Venkatachalam v. Bombay Dyeing & Mfg. Co. Ltd. (1958) S. TR 141 : (AIR 1958 SC 875).

The Supreme Court had upset the judgment of the High Court on the ground that in view of the acquittal of the returned candidate on the date of decision of election petition by the High Court the disqualification was removed retrospectively and being qualified, his nomination paper was not wrongly accepted. However, the interpretation of the then sub-sections (2) and (3) of Sec. 8 of the Act and the decision in respect of effect of filing of appeal against the conviction and suspension of sentence by the appellate Court on disqualification as given in the judgment of Vidhya Pradesh High Court were not scrutinised by the Supreme Court as such, these continue to be on record and have persuasive value.

The result of the above discussion is that the election of Sh. Rakesh Singha is void as the result of his election has been materially affected by the improper acceptance of his nomination as he is disqualified to be chosen to fill the seat of 8 Shimla Assembly Constituency having been convicted and sentenced to imprisonment for a period of more than two years by judgment dated 7/9-1987 in Cri. Appeal No. 42 of 1979 passed by this Court. The order dated 10-1-1989 and

2-2-1990 passed by the Supreme Court, releasing Sh. Rakesh Singha on bail, resulting in the suspension of sentence imposed upon him, do not arrest the disqualification which was in operation on the date of scrutiny of his nomination under Sec. 36 of the Act and also continues to be in operation when these election petitions are being decided.

In view of the above findings in Election Petition No. 4 of 1994, as well as in respect of preliminary issue in Election Petition No. 5 of 1994, this Court need not proceed with the trial of remaining issues in Election Petition No. 5 of 1994. Similarly, though on the issue framed in Election Petition No. 1 of 1994, evidence has been recorded and arguments heard, yet, this court need not record its findings as it has already held the election of Sh. Rakesh Singha void in Election Petition No. 4 and 5 of 1994.

Consequently, Election Petitions No. 4 and 5 of 1994 are allowed and Election Petition No. 1 of 1994 is disposed of. It is held that Sh. Rakesh Singha was disqualified for being chosen as member of Himachal Pradesh Legislative Assembly as he had incurred the disqualification under sub-section (3) of Sec. 8 of the Representation of the People Act, 1951 and, therefore, his nomination paper ought to have been rejected by the Returning Officer in accordance with the provisions of Sec. 36 (2)(*a*) of the Act. Acceptance of his nomination was accordingly improper which has materially affected the result of election and ground of Sec. 100 (1)(*d*) (*i*) of the Act is made out. The election of Sh. Rakesh Singha to 8th Shimla Assembly Constituency is declared as void on the grounds contained in Sec. 100 (1)(*d*)(*i*) of the Act.

The petitioner in Election Petition No. 4 of 1994 shall get his costs from Sh. Rakesh Singha. No cost is being awarded to the petitioner in Election Petition No. 5 of 1994 as he had failed to raise objection at the time of scrutiny of the nomination under sub-section (2) of Sec. 36 of the Act. Similarly, the petitioner in Election Petition No. 1 of 1994 is also not entitled to costs findings are not recorded in his petition in view of the decision of Election Petitions No. 4 and 5 of 1994.

The substance of this decision be intimated to the Election Commission as also to the Speaker of the Himachal Pradesh State Legislative Assembly forthwith and that an authenticated copy of this decision be also sent to the Election Commission at the earliest.

By order,

13th September, 1994 (dr).

GHANSHYAM KHOHAR,
Secretary,
Election Commission of India.

नियन्त्रक, मुद्रण तथा लेखन सामग्री, हिमाचल प्रदेश, शिमला-5 द्वारा मुद्रित तथा प्रकाशित ।